APPENDIX A

FIRST COURT OF APPEALS

NO. 01-81-0017-CR

J. L. DAY
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from the County Criminal Court at Law No. 3
of Harris County
Trial Court Cause Number 565,890

This is an appeal from a conviction in the County Court of Harris County for violation of a provision of a city ordinance of the city of Bellaire which prohibits, among other things, the parking of certain vehicles in "front yard space" of a home situated in certain districts in the city. The court assessed punishment at a fine of $101.00.

Appellant is a resident home owner in Bellaire. He owns a house car (defined as a vehicle that has a camping unit mounted on it) which he has parked within the distance between the edge of the curb and the outermost surface of his home. In 1976, the City of Bellaire enacted Section 23-143 (Vehicle Parking Regulation) of Chapter 24 (Planning and Zoning) into the city's code of ordinances. The provision states:

> In the R-1, R-2, R-3, R-4, R-5, R-6, D-1, D-2, MF-1, and, M-2 Districts, no truck exceeding three-fourth (¾) ton capacity, no bus in excess of fifteen (15) feet in length or seven (7) feet in height, no recreational vehicle, trailer, boat or mobile home shall be parked or stored on any abutting street or within the required front yard space of any property in such Districts, and shall not anywhere within any of said Districts be used as a dwelling nor for business/commercial or storage purposes . . .

Appellant's home is built such that the attached garage is on a continuous frontal line with the house. He is unable to park his house car in his own driveway without violating the ordinance. However, appellant has parked his house car on the lot in an area between the edge of the curb and the edge of the paved surface abutting a front and side yard and the outermost surface of his home and as a result, he has received many citations for violating this ordinance.

The appellant and the State stipulated that he parked in the aforementioned area and that he owned the house and the vehicle. It was further stipulated that the vehicle was in excess of 7 feet high and 15 feet long.

At the trial of the case in county court, an official of the State Department of Highways and Public Transportation testified that the vehicle in question was described as a "house car" and as such was legally distinguishable from a "motor home." A house car, as previously stated, has the camping unit mounted on it, while the motor home is self-propelled and the body completely covers the chassis (or frame—not body—of the vehicle). The distinction *is* recognized by the Department of Highways, but the same registration is issued to both vehicles. The

Bellaire ordinance specifies "motor home" in the Complaint in question but the difference appears to be only in the designation by the manufacturer and by the licensing division of the State Department of Highways in Public Transportation.

The appellant argues that there is a fatal variance between the complaint, which describes his vehicle as "motor home," and the evidence offered at trial, which termed this vehicle a "house car." The Bellaire ordinance defines a motor home as a vehicle of the exact dimensions and uses as the appellant's vehicle. At trial, appellant was read the description of a "motor home," as prohibited by the ordinance, and he agreed that his vehicle fit the definition. The fact that the prohibited vehicle was given a different name by an agency of the State and one of its political subdivisions would not, standing alone, cause a fatal variance to exist. The type of vehicle prohibited was clearly defined in the ordinance.

Appellant urges that the court should have sustained his motion to quash the complaint and should not have found him guilty because this ordinance was an unreasonable exercise of the State's police power and is therefore unconstitutional. Before discussing the constitutional issues presented by this case, we must consider the extent of our review of a city ordinance on appeal.

In *Baccus v. City of Dallas*, 450 S.W.2d 389 (Tex. Civ. App.—Dallas), aff'd, 454 S.W.2d 391 (Tex. 1970) the court stated that a city ordinance was presumed to be valid and that courts should not interfere unless the ordinance was clearly unreasonable and arbitrary and represented a clear abuse of discretion. The court further stated "if the question is fairly debatable, courts will not

interfere." The court in *City of Garland v. Texas Power and Light Co.*, 342 S.W.2d 816 (Tex. Civ. App.—Dallas 1961, no writ) provided that before the court could interfere with the operation of a city ordinance it must clearly appear to be arbitrary, unreasonable and an abuse of police power. The court in *Topletz v. Thompson*, 342 S.W.2d 151 (Tex. Civ. App.—Waco 1960, no writ) stated:

> We have not been cited to any Texas cases exactly on point. But the constitutionality of zoning ordinances in general has been too firmly established in this State to require a citation of authorities. A zoning ordinance will be presumed to be valid. The extraordinary burden rests on one attacking a zoning ordinance to show that it is invalid.

As these cases hold, a party attacking an ordinance must show that it is unreasonable and an abuse of discretion; any doubts will be resolved against him. He also must overcome the presumption that the ordinance is valid and constitutional.

Appellant presented no evidence in the trial court relating to the invalidity of the ordinance; therefore, there is no showing that the ordinance is invalid.

Affirmed.

/s/ JAMES F. WARREN
Associate Justice

Chief Justice Evans and Associate Justice Duggan also sitting. No Publication. TEX.R.CIV.P. 452

Judgment rendered and opinion filed March 4, 1982.

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, July 21, 1982

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 465-82, J. L. Day.

Sincerely yours,

THOMAS LOWE, Clerk